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No. ———

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *et al.*,
Petitioners,

v.

JOHNSON CONTROLS, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Where an employer policy excluding all fertile women from certain jobs because of concerns for the health of any fetus that those women may conceive is challenged as unlawful gender discrimination violative of Title VII of the Civil Rights Act of 1964:

a. does the plaintiff or the defendant bear the burden of proving that the employer's justification for excluding women from certain jobs meets Title VII standards?

b. is that justification judged under the explicit provisions of the statutory affirmative defense for bona fide occupational qualifications or is the employer entitled to assert an additional, broader "legitimate business justification" defense not explicitly stated in the statute?

c. if only the statutory bona fide occupational qualification defense is available, does a fetal protection purpose come within the bounds of that defense?

2. Are scientific animal studies insufficient as a matter of law to demonstrate a significant risk to humans due to the exposure to a toxic substance?

LIST OF PARTIES TO THE PROCEEDING

The plaintiffs in the district court, appellants in the court of appeals and petitioners in this Court, are: the United Automobile, Aerospace & Agricultural Implement Workers of America International Union ("UAW"); UAW Local Unions Nos. 12, 119, 509, 754, 1283, 1343, 1371, 1516 and 1719; and Lois Sweatman, Linda Burdick, Elsie Nason, Mary Estalled Schmitt, Shirley Jean Mackey, Mary Craig, Anna May Penney, and Donald Penney, representing the class of all past, present and future production and maintenance employees employed in bargaining units represented by the UAW at nine plants owned by Johnson Controls, Inc.

The defendant in the district court, appellee in the court of appeals, and respondent in this Court is Johnson Controls, Inc.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
A. The Facts	3
1. The Exclusion of Women from Battery Manufacturing Positions	3
2. Harms Caused By Lead	6
B. The Proceedings Below	10
REASONS FOR GRANTING THE WRIT	14
I. Title VII Analysis	15
II. Animal Studies Exclusion	26
III. Importance Of The Case	27
CONCLUSION	30

TABLE OF AUTHORITIES

CASES — Page

Arizona Governing Committee v. Norris, 463 U.S. 1073 (1983) 22
Burwell v. Eastern Airlines, 633 F.2d 361 (4th Cir. 1980) 23
City of Los Angeles Department of Water v. Manhart, 435 U.S. 713 (1978) 17, 19, 25
Dothard v. Rawlinson, 433 U.S. 321 (1977) 21, 22, 25
Environmental D.F., Inc. v. Environmental Pro. Agcy, 510 F.2d 1292 (D.C. Cir. 1975) 15, 26
Environmental Defense Fund Inc. v. E.P.A., 548 F.2d 998 (D.C. Cir. 1976) 15, 27
Hayes v. Shelby Memorial Hospital, 726 F.2d 1543 (11th Cir. 1984) ..... *passim*
Industrial Union Department v. American Petrol. Inst., 448 U.S. 607 (1980) 15, 26
Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669 (1983) 16
Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) 16, 21
Price Waterhouse v. Hopkins, —— U.S. ——, 109 S. Ct. 1775 (1989) ..... *passim*
Public Citizen Research Group v. Tyson, 796 F.2d 1479 (D.C. Cir. 1986) 15, 16, 27
Teamsters v. United States, 431 U.S. 324 (1977) 17
Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985) 17, 22
United Steelworkers of America v. Marshall, 647 F.2d 1189 (1980), *cert. denied*, 453 U.S. 913 (1981) 6, 7
Ward's Cove Packing Co. v. Atonio, —— U.S. ——, 109 S. Ct. 2115 (1989) 11, 18, 20
Watson v. Fort Worth Bank and Trust Co., —— U.S. ——, 108 S. Ct. 2777 (1988) 18
Western Air Lines v. Criswell, 472 U.S. 400 (1985) 22, 23
Wright v. Olin Corp., 697 F.2d 1172 (4th Cir. 1982) ..... *passim*

TABLE OF AUTHORITIES—Continued

STATUTES AND REGULATIONS — Page

28 U.S.C. § 1254(1) 2
29 C.F.R. § 1910.1025 (1987) 7
Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ..... *passim*
§ 701(k), 42 U.S.C. § 2000e(k) 16
§ 703(e), 42 U.S.C. § 2000e-2(e) 21
Clean Air Act, 42 U.S.C. § 7401 *et seq.* 27
Consumer Product Safety Act, 15 U.S.C. § 2051 27
Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 301, § 348(c)(3)(A) 27
Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136-136Y 27
Federal Water Pollution Control Act, 33 U.S.C. § 1317(a) 27
Occupational Safety and Health Act, 29 U.S.C. § 651 27
Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) 13
Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6901 *et seq.* 27
Safe Drinking Water Act, 42 U.S.C. §§ 300(f) *et seq.* 27
Toxic Substances Control Act, 15 U.S.C. §§ 2601-2629 27

MISCELLANEOUS

H. Rep. No. 95-948 (95th Cong. 2d Sess. 1978) 16, 23
S. Rep. No. 95-331 (95th Cong. 1st Sess. 1977) 16, 23
43 Fed. Reg. 52952 *et seq.* (1978) 4
43 Fed. Reg. 52960 4
43 Fed. Reg. 52966 4
43 Fed. Reg. 54398 4
45 Fed. Reg. 7514 (1980) 19, 28
46 Fed. Reg. 3916 (1981) 19
50 Fed. Reg. 9400-01 (1985) 9

TABLE OF AUTHORITIES—Continued

	Page
Becker, *From Muller v. Oregon to Fetal Vulnerability Policies*, 53 U. Chi.L.Rev. 1219 (1986)	23, 29
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Hricko, *Social Policy Considerations of Occupational Health Standards: the Example of Lead and Reproductive Effects*, 7 Preventive Medicine 394 (1978)	28
Marcus and Cothern, *The Characterisitcs of An Adverse Effect: Using the Example of Developing a Standard for Lead*, 16 Drug Metabolism Reviews (1985-86)	9
U.S. Congress, Office of Technology Assessment ("OTA"), *Reproductive Health Hazards in the Workplace* (1985)	28
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Williams, *Firing the Woman to Protect the Fetus: The Reconciliation of Fetal Protection with Employment Opportunity Goals Under Title VII*, 69 Geo. L.J. 641 (1981)	29

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Petitioners International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, *et al.*, plaintiffs in the district court and appellants in the court of appeals, petition this Court to issue a writ of *certiorari* to the United States Court of Appeals for the Seventh Circuit to review the judgment in *International Union, UAW v. Johnson Controls, Inc.*, 886 F.2d 871 (7th Cir. No. 88-1308; Sept. 26, 1989).

OPINIONS BELOW

The Court of Appeals' opinion is reported at 886 F.2d 871, and is reproduced at pp. 1a-101a of the separately bound appendix to this *certiorari* petition (hereinafter "Pet. App."). The opinion of the United States District Court for the Eastern District of Wisconsin is reported at 680 F. Supp. 309, and is reproduced at Pet. App. 102a-120a.

JURISDICTION

The Court of Appeals' opinion and judgment were issued on September 26, 1989. On December 8, 1989, Justice Stevens signed an order extending the time for filing a *certiorari* petition to and including January 12, 1990. On January 4, 1990, Justice Stevens signed an order further extending the filing date to and including January 29, 1990. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant portions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, are set out at Pet. App. 145a-46a.

STATEMENT OF THE CASE

Johnson Controls, Inc. ("the employer" or "the company") is a manufacturer of batteries. Occupational exposure to lead, the primary material used in the battery manufacturing process, entails a health risk to workers, including a risk of harm to fetuses conceived by workers. Pet. App. 32a.

This case concerns the question whether Johnson Controls is permitted, under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., to ban women who cannot prove infertility, but no men, from: jobs in which *one* employee in the last year had a blood lead level reading beyond that the company considers safe for fetuses carried by pregnant women; jobs which are performed in areas in which the air lead level reading exceeds that which the company considers safe for fetuses; *and* all jobs in lines of progression which contain any banned lead-exposed positions.

On the defendant company's motion for summary judgment, the Disrtict Court upheld the employer's policy. After briefing and oral argument before a panel of the Seventh Circuit, but in advance of issuance of any opinion, the Court of Appeals as a whole decided that

the issues presented by this case are of sufficient consequence to warrant hearing *en banc*. Pet. App. 2a.

The resulting *en banc* decision concluded, by a 7-4 vote, that Johnson Controls is entitled to maintain its policy despite the fact that the policy explicitly disadvantages women on the basis of gender, and does so for reasons entirely unconnected to ability of women to perform their assigned employment tasks.

Judges Posner, Easterbrook, and Cudahy filed dissenting opinions, and Judge Flaum joined in Judge Easterbrook's dissent.

A. The Facts

1. *The Exclusion of Women from Battery Manufacturing Positions*

In 1977, Johnson Controls instituted its official policy regarding the employment in lead-exposed jobs of women who cannot demonstrate that they are infertile. At that time, the employer was of the view that:

> [P]rotection of the health of the unborn child is the immediate and direct responsibility of the prospective parents. While the medical profession and the company can support them in the exercise of this responsibility, it cannot assume it for them without simultaneously infringing their rights as persons.
>
> We believe that pregnancy is almost always a voluntary act and that the subsequent bearing of child is voluntary. Since not all women who can become pregnant wish to become mothers, . . . it would appear to be illegal discrimination to treat all who are capable of pregnancy as though they will become pregnant. [Beaudoin Aff., Exh. J.]

Consistent with that view, the company suggested, but did not require, that women who wished to do so choose non-lead exposed jobs where such jobs were availab'e. The company did not, however, provide any guaranteed transfer for women who wished to leave lead-exposed

jobs, nor did the company protect the prior wage rate of any woman who did transfer for that reason.

In 1978, OSHA announced its Final Standard for Occupational Exposure to Lead. 43 Fed. Reg. 52952 et seq. (1978); 29 C.F.R. § 1910.1025 (1987). When that standard was being considered, OSHA devoted particular attention to the question whether the possible effects on fetuses carried by pregnant workers justified excluding women entirely from at least certain lead-exposed positions. 43 Fed. Reg. 52960 ("No topic was covered in greater depth or from more vantage points than the subject of women in the lead industry.").

On the basis of its close study of the question, OSHA concluded that "there is no basis whatsoever for the claim that women of childbearing age should be excluded from the workplace in order to protect the fetus or the course of pregnancy." 43 Fed. Reg. 52966; *see also, e.g.*, 43 Fed. Reg. 54398. Instead, OSHA established a series of mandatory protections which, taken together, "should effectively minimize any risk to the fetus and newborn child." 43 Fed. Reg. 52966.[1] The Agency stated in addition:

> The record in this rulemaking is clear that male workers may be adversely affected by lead as well as women. Male workers may be rendered infertile or impotent, and both men and women are subject to genetic damage which may affect both the course and outcome of pregnancy. . . . Effective compliance with all aspects of this standard will minimize the risk to all persons and should therefore insure equal employment for both men and women. [43 Fed. Reg. 52966.]

[1] Those protections, based upon the recognition that workers who are planning families should have blood lead levels below 30 μg/dl, included periodic blood lead level tests and air monitoring beginning at a 30 μg/m3 *air* lead level; medical surveillance, including fertility testing and the right to have review by several physicians; educational and training provisions, so that "workers are fully informed of the potential hazards from exposure to lead on their reproductive ability, during pregnancy and following birth"; and, where workers are planning families and reduction of blood lead levels is medically indicated, the possibility of temporary removal from lead-exposed jobs, with wage protection and assured possibility of return to the lead-exposed position for up to eighteen months. 43 Fed. Reg. 52966.

In 1982, Johnson Controls, despite its own earlier pronouncements and those of OSHA, announced a broad exclusion of women from lead exposed jobs:

> It is [Johnson Control's] policy that women who are pregnant *or who are capable of bearing children* will not be placed into jobs involving lead exposure *or which could expose them to lead through the exercise of job bidding, bumping, transfer or promotion rights.* [Pet. App. 9a (emphasis supplied).]

Johnson Controls' policy was applied to particular positions based not on the average or mean blood level of the job incumbents, but upon whether a *single* individual in that position, at any time in the preceding year, showed a blood lead level of more than 30 μg/dl. Pet. App. 5a. In addition, a job is banned if the *air*-lead level is more than 30 μg/m3, even though such an air-lead level reading is likely to produce a blood-lead level much lower than 30 μg/dl. 45 Fed. Reg. 52960-61. Moreover, even though the company allowed *incumbent* women employees to remain in lead-exposed positions if, on the basis of individual blood-lead level monitoring, those incumbents were able to keep their blood lead at the level the company considers safe for fetuses, the employer did *not* allow any women seeking to be hired or promoted into lead-exposed positions to demonstrate through individual blood monitoring an ability to keep her blood lead level below 30 μg/dl.[2] In addition, as already noted, the ban

[2] The company's explanation for its refusal to provide for *individual* testing for dangerous blood lead levels was, in part, to avoid frequent blood level testing and, in addition, that "the potential for greatest exposure [to lead] is right at the outset while the employee is learning the proper work practices." Beaudoin Dep. at 163; *see*

extended beyond the jobs actually exposed to lead; there is no explanation in the record of any health or safety basis for the breadth of the ban. Finally, the company insisted on banning *all* women who could not prove their infertility from lead-exposed jobs, regardless of their family status, age, sexual orientation, or expressed intention to bear children.

The sum of the matter is that, in practical terms, the company's policy was to bar women capable of bearing children from *all* manufacturing jobs in its battery plants (except a few held by incumbent women). Pet. App. 97a; Ross Depo. Ex. 8. .

2. *Harms Caused by Lead*

Lead is a toxic substance that can cause a wide range of health problems in men, women, and children, depending upon the exact exposure level. *See, e.g., United Steelworkers of America v. Marshall*, 647 F.2d 1189, 1248-49 (1980), *cert. denied* 453 U.S. 913 (1981). In particular, "at least one part of the body, the reproductive system, begins to suffer very serious subclinical effects at 30 ug/100g of lead in the blood." *Id.* Those effects, according to OSHA, include *both* a risk to fetuses carried by pregnant employees resulting from lead exposure *in utero and* other serious impacts upon the reproductive systems of *both* men and women:

> The rulemaking produced ample evidence confirming the grave danger lead poses to prospective mothers and fetuses . . . OSHA [also] found evidence that lead-exposed males suffer serious harm to their spermatogenesis, including malformed sperm (teratospermia), decreased motility of sperm (asthenospermia), and decreased number of sperm (hypospermia). . . . Older studies found alarmingly

Pet. App. 10a. The company did not explain why proper training on hygiene techniques could not be provided *before* an employee begins work at a lead-exposed position.

> high rates of sponteneous abortion, stillbirth, and birth defects in the pregnancies of women married to lead-exposed workers . . . Other studies found chromosomal abnormalities among lead exposed [male] workers.
>
> OSHA thus found abundant support for the view that a lead standard must protect the reproductive capacities of males as well as females. [647 F.2d at 1257.]

On the basis of its lengthy consideration of the issue, OSHA decided that

> because of the demonstrated adverse effects of lead on reproductive function in both male and female as well as the risk of genetic damage of lead on both the ovum and sperm, OSHA recommends a 30 microgram/100 g maximum permissible blood level in *both males and females who wish to bear children.* [29 C.F.R. § 1910, pp. 833-34 (emphasis supplied).]

The District of Columbia Circuit approved this finding as well supported by the extensive administrative record. *United Steelworkers of America v. Marshall*, 647 F.2d at 1248-49.

Not surprisingly given this background, there was no dispute among the experts in this summary judgment case on the basic fact that, as OSHA had concluded, lead poses a risk to fetuses of pregnant workers at the 30 μg/dl blood lead level.[3] The summary judgment record

[3] At the relatively low blood lead levels which Johnson Controls regards as sufficient to bar fertile women, the primary risk is that the children born will have "very subtle" learning problems, and may exhibit behavioral problems such as hyperactivity. Pet. App. 15a, 16a. The record is undisputed on the fact that, contrary to the Court of Appeals' statement, Pet. App. 17a, fetal lead exposure at the levels involved in this case does *not* cause structural abnormalities in vital organs, *e.g.*, Chisolm Depo. 27, 29, 40, 41, 47; Whorton Depo. 4-5.

There was some evidence, including a Center for Disease Control ("CDC") Report, that the risk of cognitive and behavioral harm to

here does not, however, address at all the significance of that risk. There is no evidence, for example, whether, at the blood lead levels here at issue, the likelihood of *any* harm to a child of an exposed women employee is one in ten, one in a hundred, one in a thousand, or one in a million. *See* Pet. App. 90a (Easterbrook, J., dissenting).[4]

There was, in addition, directly *conflicting* evidence in the summary judgment record concerning the *other* harms caused by lead at the blood lead levels enforced by Johnson Controls for fertile women. There was evidence both supporting and disputing OSHA's conclusion that at the 30 μg/dl blood lead level, the reproductive capacities, and the health of potential children, of *both* men and women were at significant risk.

The plaintiffs' experts were uniformly of the view that, as OSHA had concluded, the available evidence, including animal *and* human studies completed after the OSHA record was closed, support the conclusion that at the 30 μg/dl blood lead level, there is a significant risk of injury to the male reproductive system, including effects on the pregnancies of wives of male employees.[5] Defend-

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children exposed to lead *in utero* occurs at blood lead levels lower than 30 μg/dl. *See* Pet. App. 14a. Johnson Controls, however, only purports to enforce a blood lead level of 30 μg/dl, the level OSHA held to be an appropriate benchmark for both men and women intending to have children. And OSHA, not the CDC, is the agency charged by Congress with determining the appropriate occupational health standard for male *and* female workers after, considering whether there is a significant risk due to various levels of occupational exposure. 29 U.S.C. §§ 651(b)(3) & 655(b)(5).

[4] There was some conflict in the competing affidavits on: precisely how and when harm to the fetus through the mother occurs; and how that risk compares to the risks to adults posed by lead, and to other fetal risks women encounter in their daily lives.

[5] In stating that the plaintiffs' experts had no human studies to rely on, the Court of Appeals was simply wrong. For example,

ant's experts maintained, to the contrary, that there was either no evidence of a reproductive effect on males or of a fetal effect mediated through males, or that there was no evidence of such effects at the 30 μg/dl blood lead level at issue in this case. Pet. App. 33a; Whorton Aff. ¶ 7; Chisolf Aff. ¶¶ 7-8; Hammond Aff. ¶¶ 6-7.

There was also evidence presented by the plaintiffs' experts, backed by *both* animal and human studies reported in scientific papers, that there is a significant risk to the health of *adult* men and women at the 30 μg/dl blood lead level, including neurological and cardiovascular injury and an increased likelihood of certain forms of cancer. One of the plaintiffs' experts noted, for example, that recent studies of adults males show that they suffer a significant increase in high blood pressure at 15-25 μg/dl blood lead level. Silberbeld Depo. 68-69, 87.[6]

Defendant's experts denied any such effects at blood levels below 50 μg/dl in general terms, but did not specifically refer to or dispute the evidence relied upon by

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those experts referred to, *inter alia*, one study by the National Institute of Occupation Safety and Health (NIOSH) of male lead battery plant workers, concluded in 1984, that reported a significant loss of fertility in families where the men had been exposed to lead, including a 25% loss of fertility where the male worker had a blood lead level of 25-33 μg/dl and the wives had blood lead levels much lower.

[6] The Environmental Protection Agency ("EPA") relied upon these studies in considering the further reduction of lead in gasoline. *See* 50 Fed. Reg. 9400-01 (1985) (EPA discussion of studies demonstrating that adult males are subject to an increased risk of high blood pressure, with resultant dangers of heart disease and strokes, at blood lead levels well below those which Johnson Controls considers safe for fertile women); Marcus and Cothern, *The Characteristics of An Adverse Effect: Using the Example of Developing a Standard for Lead*, 16 Drug Metabolism Reviews 423, 430 (1985-86) ("if blood lead levels were lowered from 17 to 10 micrograms/deciliter there would result in savings of a minimum of 50,000 [heart attacks], 70,000 strokes and 25,000 predicted deaths over a 10-year period").

the plaintiffs' experts. Whorton Aff. ¶¶ 6, 8; Scialli Aff. ¶ 10; Chisolm Dep. at 15.

B. The Proceedings Below

This challenge to Johnson Control's policy excluding fertile women from battery manufacturing jobs was filed by eight employees, certified as representatives of a class of similarly situated employees, and the union representing them, the International Union, UAW. Among the individual plaintiffs were one female employee who submitted to sterilization in order to avoid loss of a desireable position, Complaint ¶ 79; several female employees (one of whom was fifty years old and divorced) who were transferred from lead-exposed positions, with loss in compensation, Complaint ¶¶ 56, 66, 67, 72, 75, 79; two female employees who were unable to transfer into lead-exposed positions to which they were otherwise entitled, with resulting loss of income and employment advancement opportunity, Complaint ¶ 79; and one male employee who sought a leave of absence for the purpose of lowering his blood lead level because he intended to become a father and was constructively discharged for making the request, Complaint ¶ 79 & Ex. I.

After discovery, the defendant company sought, and the District Court granted, summary judgment. That court held:

> Because of the fetuses possibility of unknown existence to the mother and the severe risk of harm that may occur if exposed to lead, the fetal protection policy is not facially discriminatory . . . [Pet. App. 116a.]

The District Court therefore treated the explicit gender-based discrimination in this case as if the employer followed a neutral policy that only has a disparate *impact* upon women as a group. Pet. App. 117a. And, in analyzing this proceeding as a disparate impact case, the District Court applied an "expanded business necessity defense," permitting an employer's interest in protecting the potential offspring of employees to constitute such a defense. Pet. App. 116a-117a.

The *en banc* court of appeals majority affirmed, on doctrinal grounds even broader in their potential application than those adopted by the District Court.

First, the Court of Appeals agreed with the District Court that where an employer purports to justify discrimination against women that explicitly takes gender into account on grounds connected to the health of potential off-spring "a business necessity defense may be utilized." Pet. App. 27a. The Court of Appeals, citing this Court's opinion in *Ward's Cove Packing Co. v. Atonio*, —— U.S. ——, 109 S. Ct. 2115, 2125-26 (1989), then *placed on the plaintiff, not on the defendant*, the burden of persuasion on the key evidentiary issues that purportedly justify departure from ordinary disparate treatment analysis. Pet. App. 28a-32a.

Specifically, under the Court of Appeals' analysis, once the employer indicates that its motive for a job exclusion policy explicitly based upon gender is protection of fetal health, the *plaintiff* must prove that it is more likely than not: (1) that there is *no* substantial risk of harm to the fetus a women employee may be carrying from the workplace substance or process said to endanger fetal health, Pet. App. 32a; *or* (2) that the risk of harm to fetal health is *not* "substantially confined to fertile female employees," Pet. App. 33a; *or* (3) that there are alternative policies which would protect against the risk of fetal harm equally well, with less discriminatory impact, Pet. App. 37a.

The Court of Appeals expressly recognized that placing the burden of proof on the plaintiffs—especially with respect to the second of these issues—was essential to its ultimate affirmance of summary judgment for the defendant company. Pet. App. 30a, 31a, 33a. In particular, in considering whether the plaintiffs had met their putative burden of proof as to the second issue, the Court

of Appeals recognized that the plaintiffs' experts had relied on animal studies from which those experts concluded that there is a risk of fetal injury mediated through lead-exposed male workers, and ruled that

> animal research does not present the type of solid scientific data necessary for a reasonable factfinder to reach a non-speculative conclusion that a father's exposure to lead presents the same danger to the unborn child as that resulting from a female employee's exposure to lead. [Pet. App. 34a.]

Second, the Court of Appeals adopted an alternative theory for upholding the District Court's judgment in favor of the company. Although the District Court had declined to reach the issue, the Court of Appeals decided that "Johnson Controls' fetal protection policy could be upheld [on summary judgment] under the bona fide occupational qualification defense." Pet. App. 42a. Where a business may present some dangers to the health of a fetus carried by an employee, protection of the fetus, said the Court of Appeals, is part of the "essence" of the business even though fertile women are fully able to carry out the job's tasks without danger to the company's customers or to their fellow employees. Pet. App. 48a. And the court of appeals majority found that the employer's specific policy here was "reasonably necessary" to protecting fetal health, despite the absence of *any* explanation in the record for several aspects of the employer's policy (such as the failure to individually monitor blood lead levels and to provide adequate training for new lead-exposed employees). *See* Pet. App. 72a (Posner, J., dissenting).

The four dissenters wrote three dissenting opinions. Judge Posner and Judge Cudahy were of the view that a case such as this one must be analyzed as a disparate treatment case, *not* as a disparate impact case; that the burden of proof as to any justification for the employer's policy must be on the employer, *not* on the plaintiff; and that, while an affirmative bona fide occupational qualification defense ("bfoq") *may*, in very narrow circumstances, be available for justifying fetal protection policies, it was entirely inappropriate to grant summary judgment for the employer on that defense on the record here. Pet. App. 60a, 70a, 73a.

Judge Easterbrook wrote a lengthy dissenting opinion that made three essential points:

First, under Title VII, as modified by the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) ("PDA"),[7] and as interpreted uniformly in this Court's cases, a policy that explicitly discriminates on the basis of capacity to bear children constitutes disparate treatment on the basis of gender, regardless of the employer's purpose in adopting the policy; thus, the only available defense is the affirmative bfoq defense and not a broader legitimate business justification defense. Pet. App. 75a-81a.

Second, the proffered justification for the employer's fetal protection policy—the moral imperative of protecting fetal health from mistaken parental risk assessments—does not, as a matter of law, meet the PDA standard of equal treatment of employees "similar in their ability or inability to work", and is not a basis for a legally cognizable bfoq defense. Pet. App. 84a.

Third, even on the disparate impact theory adopted in the alternative by the court of appeals majority, the record here does not provide a sufficient basis for rejecting OSHA's conclusion that exclusion of women from a lead-exposed workplace is *not* justified by the scientific evidence. Pet. App. 93a-99a. In particular, "the medical profession, like the Food and Drug Administration, will be stunned to discover that animal studies are too 'speculative'. Often animal studies are the best foundation for decision." Pet. App. 96a.

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[7] The majority opinion does not mention the PDA.

REASONS FOR GRANTING THE WRIT

This case presents a Title VII gender discrimination question of great theoretical and practical importance. As Judge Easterbrook stated in his dissenting opinion below:

> This is the most important sex-discrimination case this circuit has ever decided. It is likely the most important sex-discrimination case in any court since 1964, when Congress enacted Title VII. If the majority is right, then by one estimate 20 million industrial jobs could be closed to women, for many substances in addition to lead pose fetal risks . . . Whether that would happen is of course a separate question. . . . But the law would allow employers to consign more women to "women's work", while reserving better-paying but more hazardous jobs for men. Title VII was designed to eliminate rather than perpetuate such matching of sexes to jobs. [Pet. App. 99a-100a.]

The three courts of appeals that have treated with the question in this case have left the law on employer fetal protection policies that bar women from certain jobs in total disarray. While all agree that an employer policy of this kind substantially disadvantages women and is thus invalid unless justified in some manner, those courts disagree entirely upon the critical issues of the evidentiary burdens to be borne by each party in the proof of the applicable justification and even on the substantive content of that justification.

In particular, the majority opinion in this case flatly conflicts with its predecessors—*Wright v. Olin Corp.*, 697 F.2d 1172 (4th Cir. 1982); *Hayes v. Shelby Memorial Hosp.*, 726 F.2d 1543 (11th Cir. 1984)—in two basic regards, each of which is of sufficient importance to be outcome determinative in this case:

First, the majority below determined that an employer may justify a policy that explicitly discriminates against women simply by *coming forward with evidence of* a

fetal protective motive. In contrast, the Fourth and Eleventh Circuits—and this Court in *Price Waterhouse v. Hopkins*, —— U.S. ——, 109 S. Ct. 1775 (1989)—place *a normal burden of persuasion* with regard to any applicable statutory justification squarely upon the employer.

Second, the majority below also held that protection of fetal health is a legally proper basis for a bona fide occupational qualification defense ("bfoq") to explicit gender-based discrimination. The Fourth and Eleventh Circuits, however, hold that because concerns about fetal health are unrelated to the ability of women to perform their jobs, such concerns are *not* a proper basis for a bfoq defense.

Each of these holdings significantly narrows Title VII's prohibition against gender discrimination; indeed, taken together, the Court of Appeals' rulings in these two regards effectively insulate employer fetal protection policies such as the one here from Title VII scrutiny. At least equally to the point, both of these rulings are contrary to well-settled Title VII principles governing employer policies that discriminate against women on their face as declared by this Court.

In addition, the holding of the court below that animal studies can *never* constitute substantial evidence of risk to humans, is both vital to its result and squarely in conflict with several decisions of the District of Columbia Circuit,[8] a plurality opinion of this Court[9], and the long-standing practice of a myriad of federal agencies involved in risk analysis and regulation.

All the foregoing being so, this case plainly calls for this Court's review.

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[8] *Environmental D.F., Inc. v. Environmental Pro. Agcy*, 510 F.2d 1292 (D.C. Cir. 1975); *Environmental Defense Fund Inc. v. E.P.A.*, 548 F.2d 998, 1005-10 (D.C. Cir. 1976); *Public Citizen Research Group v. Tyson*, 796 F.2d 1479 (D.C. Cir. 1986).

[9] *Industrial Union Dept. v. American Petrol. Inst.*, 448 U.S. 607 (1980).

I. Title VII Analysis

A. (1) The company's fetal protection policy explicitly and overtly denies women employment opportunities because of their gender: *All* fertile women, but *no* fertile men, are precluded from holding certain jobs.[10] Moreover, even if the company's policy drew a line of demarcation that, as the Court of Appeals evidently thought, turned instead upon some aspect of childbearing that is unique to women, the policy would still constitute discrimination overtly based on sex.

In 1978, Congress squarely addressed the question whether a distinction centering upon a woman's childbearing capacity is a distinction "on the basis of sex," and concluded that the answer is "yes." [11] And Congress took this approach precisely because the Legislature rec-

[10] While not all women are precluded from those jobs—since sterilized, infertile, or post-menopausal women are not affected—that consideration does not make the line of differentiation one that is any less squarely based on gender: both men and women are capable of procreating in the future; because the policy nonetheless creates "one hiring policy for women and another for men —each having [the capacity to procreate]," it is policy that draws a direct gender-based distinction. *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971).

[11] The PDA provides:

> The terms "because of sex" or "on the basis of sex" include . . . because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment purposes . . . as other persons not so affected but similar in their ability or inability to work. [Title VII § 701(k), 42 U.S.C. § 2000e(k).]

Congress specifically wrote this broad language to make clear that discrimination premised in any way on women's capacity to bear children *is* discrimination based squarely on gender, and not a facially neutral employment policy. *Newport News Shipbuilding & Dry Dock v. EEOC*, 462 U.S. 669, 677-679 (1983); *see* S. Rep. No. 95-331 (95th Cong. 1st Sess. 1977) at 3-4 ("[T]he bill defines sex discrimination . . . to include those physiological occurrences peculiar to women"); H. Rep. No. 95-948 (95th Cong. 2d Sess. 1978) at 3.

ognized that in large part, the problems women have encountered in the job market have resulted from adverse treatment because of childbearing capacity:

> Women are still subject to the stereotype that all women are marginal workers. Until a women passes the child-bearing age, she is viewed by employers as potentially pregnant. Therefore, the elimination of discrimination based on pregnancy in these employment practices . . . will go a long way toward providing equal employment opportunities for women. . . . [S.Rep. 95-331, *supra*, at 6-7.]

Thus, the company's fetal protection policy "does not pass the simple test of whether the evidence shows 'treatment of a person in a manner which but for that person's sex would be different.'" *City of Los Angeles Department of Water v. Manhart*, 435 U.S. 702, 711 (1978). *See also Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121-22 (1985); *Teamsters v. United States*, 431 U.S. 324, 335 n. 15 (1977). As *Manhart* makes clear, the practice therefore "constitutes discrimination and is unlawful unless exempted by . . . some . . . *affirmative* justification." 435 U.S. at 711 (emphasis supplied).

Just last term, this Court reiterated in no uncertain terms that where a plaintiff proves an employment policy that overtly distinguishes between employees on the basis of gender, she has proven a case of illegal employment discrimination unless the *employer* carries the burden of demonstrating that some *exception* to Title VII's proscription of gender-based distinctions applies under the circumstances:

> We have in the past confronted Title VII cases in which an employer has used an illegitimate criterion to distinguish among employees, and have held that it is the employer's burden to justify decisions resulting from that practice. . . . [O]ur assmption has always been that if an employer allows gender to affect its decision-making process, then it must carry the burden of justifying its ultimate decision. [*Price Waterhouse v. Hopkins*, 109 S. Ct. at 1789.]

(2) The Court of Appeals' decision in this case is entirely inconsistent with these well-established principles. That decision holds that a policy that explicitly discriminates on the basis of gender is to be treated on the same basis as a policy neutral on its face, with only a disparate impact upon women. But this Court's cases make it clear that these two classes of cases are entirely distinct.

A case in which a plaintiff proves that "an employer has treated [a] particular person less favorably because of the plaintiff's . . . sex" is a straightforward "*disparate treatment case*," and such proof of intentional discrimination is all that the plaintiff need show to make out her case. *Watson v. Fort Worth Bank and Trust Co.*, —— U.S. ——, 108 S. Ct. 2777, 2784 (1988) (emphasis added).

In contrast, where a plaintiff *cannot* "prove intentional discrimination," but can only demonstrate a "facially *neutral* employment practice[] that [has] significant adverse effects on [a] protected *group*," the plaintiff may still be able to prove a Title VII case, but "[t]he factual issues and the character of the evidence are inevitably somewhat different" than in a disparate treatment case. *Watson v. Fort Worth Bank and Trust Co.*, 108 S. Ct. at 2784 (emphasis added). Specifically where a plaintiff *cannot* prove that a distinction was made taking gender into consideration, then the plaintiff must identify the specific employment practice complained about, prove its discriminatory impact, and "bear[] the burden of disproving an employer's assertion that the adverse employment action or practice was based solely on a legitimate neutral consideration." *Ward's Cove Packing Co. v. Atonio*, —— U.S. ——, 109 S. Ct. 2115, 2126 (1989).

As a consequence of treating this facial discrimination case as one tantamount to a disparate impact case, the Court of Appeals, citing *Wards Cove*, placed on the plaintiff the responsibility of *disproving* the legitimacy of the employer's fetal protection justification. But as *Ward's Cove* explained, in a true disparate impact case,

once the employer has articulated a legitimate neutral basis for his actions "[t]he persuasion burden . . . must remain with the plaintiff" for the reason that it is the plaintiff "who must prove that it was 'because of such individual's race, color,' etc. that he was denied a desired employment opportunity." 109 S. Ct. at 2126. Precisely because the employer practice at issue in such a case is neutral on its face only by overcoming the defendant's proffered non-discriminatory reason can the plaintiff prove Title VII discrimination. In contrast, here and in any case in which the plaintiff proves that the employer follows an employment practice that overly distinguishes between men and women, the plaintiff has met her burden of proving discrimination and can not be made to do so a second time. *Price Waterhouse v. Hopkins, supra*; *City of Los Angeles Department of Water v. Manhart, supra.*

(3) The Court of Appeals, in reaching its contrary conclusion purported to follow the lead of the Fourth Circuit in *Wright v. Olin Corp., supra*, and of the Eleventh Circuit in *Hayes v. Shelby Memorial Hospital, supra.*[12] But both

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[12] The majority opinion suggests that the EEOC as well has applied a disparate impact analysis to fetal protection policies. Pet. App. 25a-26a. However, the EEOC has just issued a document entitled "Policy Guidance on *United Auto Workers v. Johnson Controls, Inc.* . . . ." That document (which appears, for the Court's convenience, as appendix G to this petition) "clarifies the Commission's position on the proper legal analysis to be applied to charges challenging fetal protection policies." Pet. App. 127a. In that clarification, the EEOC makes plain that Commission never sanctioned the position ultimately adopted by the Seventh Circuit, and regards that position as "a significant departure from the analytical framework previously developed by the courts and endorsed by the Commission." Pet. App. 132a. In particular, the EEOC agrees with plaintiffs that:

> Fetal protection policies . . . are not neutral rules to which adverse impact analysis applies. Instead . . . policies which exclude only women constitute *per se* violations of Title VII. For the plaintiff to bear the burden of proof in a case in which there is direct proof of a facially discriminatory policy

of those courts explicitly held that on the issues of the significance of any fetal risk and of whether the risk is one that is only transmitted through women, the burden of persuasion as to whether the employer's policy is within a statutory exception to the non-discrimination principle *is on the defendant employer, not on the plaintiff*. *Wright*, 697 F.2d at 1190; *Hayes*, 726 F.2d at 1548. Indeed, this Court last term pointed to *Wright* and *Hayes* as examples of the principle that where an employer's action is overtly discriminatory, it is the *employer* that must bear the burden of justifying the apparent discrimination. *Price Waterhouse v. Hopkins*, 109 S.Ct. at 1789.

As the attention this Court gave to burden of persuasion issues last term in *Price Waterhouse v. Hopkins*, *supra*, and *Ward's Cove Packing Co. v. Atonio*, *supra*, suggests, the result in Title VII cases often turns upon which party bears that burden. Where, as here, the issues to be proven turn in whole or in part on current

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is wholly inconsistent with settled Title VII law. [Pet. App. 133a.]

Moreover, the Commission has now determined, in light of the Court of Appeals opinion in this case, that any "hybrid approach to fetal protection is problematic." Pet. App. 134a. Instead, the Commission would analyze fetal protection cases solely in terms of whether the employer can make out a bfoq defense. While, like Judge Posner, the EEOC would not exclude entirely the possibility of such a defense based upon fetal concerns, the Commission would apply that defense in a manner entirely different than the Court of Appeals did here. Pet. App. 134a-39a. Further, in its recent clarification, the Commission expressly states its view that summary judgment was inappropriate here, given the conflicting evidence, the court's exclusion of animal studies, and the court's refusal to "defer to pertinent conclusions by pertinent government agencies [here, OSHA]." Pet. App. 139a-41a.

The EEOC's position on the fetal protection issue has, of course, taken several turns. *See also* 45 Fed. Reg. 7514 (1980), 46 Fed. Reg. 3916 (1981) (announcing for public comment and then withdrawing a proposal for formal guidelines on this question). For present purposes, however, what is important is that the agency charged with enforcement of Title VII agrees that the Court of Appeals' general approach has no sound basis in Title VII.

scientific understandings and those understandings are based on only limited research, the proper allocation of the burden of persuasion is a dispositive consideration. Indeed, as *Hayes* notes, "there is, within the scientific community, a certain amount of subtle bias that has focused research on the hazardous effects of workplace substances as they pertain to reproductive health on women more than men." 726 F.2d at 1549.

Thus, particularly on the question whether a specific practice or substance adversely affects male employees' reproductive capacity and/or the health of potential children of male employees, the placement of the burden of persuasion will likely control the outcome. That was certainly so in this case: the Court of Appeals stressed that its reason for approving a grant of summary judgment for the defendant company—even though there was evidence presented on both sides of the issue of the mediation of the fetal impact of lead through the male—was that the evidence on that issue presented by the plaintiff was, in that court's view, insufficient to meet the burden of persuading the trier of fact that such effect is more likely than not. Pet. App. 30a, 31a, 33a.

B. As an alternative to its disparate impact theory, the Court of Appeals in this case held also that the employer's interest in protecting fetal health is a legally cognizable affirmative defense to a disparate treatment case, as a "bona fide occupational qualification reasonably necessary to the normal operation of the particular business or enterprise." Title VII § 703(e), 42 U.S.C. § 2000e-2(e). Again the court below erred; and again its ruling is in conflict both with the Title VII principles stated by this Court and with the rulings of the Fourth and Eleventh Circuits.

The bfoq provision states the only explicit statutory exception to the rule that an employment policy that expressly denies employment opportunities on the basis of gender is unlawful. *Phillips v. Martin Marietta Co.*, 400 U.S. at 544; *Dothard v. Rawlinson*, 433 U.S. 321, 332-33

(1977); *Arizona Governing Committee v. Norris*, 463 U.S. 1073, 1083-84 & n. 13 (1983); *see Price Waterhouse v. Hopkins*, 109 S. Ct. at 1789.[13] And this Court has addressed the question of the kind of employer interest that will support a bfoq defense twice. *Dothard v. Rawlinson*, *supra*; *Western Air Lines v. Criswell*, 472 U.S. 400 (1985).[14] *See also Trans World Airlines v. Thurston*, 469 U.S. at 122-124.

Those cases stress that the bfoq defense "provides only the narrowest of exceptions to the general rule requiring equality of employment opportunities." *Dothard v. Rawlinson*, 433 U.S. at 333. Moreover, the Court ruled that, as the statutory language suggests, a job qualification, to constitute a bfoq, must be related to the "essence," *Dothard*, 433 U.S. at 336, 337, or the "central mission of the employer's business," *Western Air Lines v. Criswell*, 472 U.S. at 413. Most to the point here, *Dothard* indicates that an employer's paternalisitc concern for a woman's personal safety does *not* meet this standard, since "it is the purpose of Title VII to allow the individual women to make [the] choice for herself . . . [whether] to weigh and accept . . . risks of employment." 433 U.S. at 335.

Based upon the foregoing, both the Fourth and Eleventh Circuits concluded that protection of an employee's

[13] *Price Waterhouse* noted that "some courts"—citing *Hayes v. Shelby Memorial Hospital*, *supra*, and *Wright v. Olin Corp.*, *supra*—have suggested that there is an additional, implicit affirmative defense where an employer contends that "its limitations on the work that it allows a pregnant women to perform are necessary in light of her pregnancy." 109 S. Ct. at 1789. *Price Waterhouse* did not, however, purport to endorse the existence of any such exception in addition to the exceptions Congress chose to provide. And, as we suggest below, there is no basis for importing such an exception into the statutory scheme. *See* pp. 22-24 *infra*.

[14] *Criswell* was decided under the Age Discrimination in Employment Act ("ADEA"), not under Title VII. However, as *Criswell* itself recounts, the relevant bfoq language in the ADEA was borrowed directly from Title VII, and has always been understood as identical in its intent and reach to the parallel provision in Title VII. 472 U.S. at 411-412, 413 n.18, 414 n.19, 416.

fetus or potential fetus is no more the type of employment interest that can constitute an "*occupational* qualification" than is protection of the woman herself. *Wright*, 697 F. 2d at 1187 (a bfoq cannot be based on a fetal protection motive, because "properly applied, this statutory defense is a narrow one . . . under which a concededly discriminatory occupational qualification is shown to be justified because related to the very ability of the disqualified person to perform the job."); *Hayes*, 726 F.2d at 1549 ("the BFOQ defense is available only when an employer can show that the excluded class is unable to perform the duties that constitute the 'essence' of the job . . . '[P]otential for fetal harm, unless it adversely affects a mother's job performance, is irrelevant to the BFOQ issue.'"). *See also Burwell v. Eastern Air Lines, Inc.*, 633 F.2d 361, 371 (4th Cir. 1980).[15]

In direct opposition to those holdings, the Court of Appeals in this case held that the company's interest in overriding a woman's own assessment of the risks of lead exposure during pregnancy is "reasonably necessary" to the "essence" of a battery manufacturer's busi-

[15] As Judge Easterbrook observed in his dissent, the language and history of the PDA support the conclusion reached by the Fourth and Eleventh Circuits on the applicability of the bfoq defense to a fetal protection policy. Pet. App. 76a, 82a. The PDA provides that women "affected by pregnancy" are to be treated "the same" as other employees "similar in their ability or inability to work." *See, e.g.*, S. Rep. No. 95-331, *supra*, at 4, ("[u]nder this bill, the treatment of pregnant women . . . must focus not on their condition alone but on the actual effects of that condition on their ability to work."); H.R. Rep. 95-948, *supra*, at 3-4.

In this connection, it is important to remember that the company's policy applies to *all* fertile women. Many women, however, have no intention of bearing children; for example, one of the plaintiffs here was fifty years old and divorced. Such women quite reasonably may judge the exposure to lead to involve no realistic risk to future children. Similarly, other women may judge that the fetal risks due to maternal poverty are greater than the fetal risks due to lead exposure while employed. *See* Becker, *From Muller v. Oregon to Fetal Vulnerability Policies*, 53 U. Chi. L. Rev. 1219, 1229-31 (1986).

ness.[16] That court so concluded even though fertile women are obviously fully capable of performing production jobs in battery manufacturing without any harm to their fellow employees or the company's customers. Pet. App. 48a.

In sum the Court of Appeals ruling in this critical regard creates a direct circuit conflict and cannot, in any event, be squared with this Court's cases construing Title VII's bfoq provision.

C. Finally, on the one aspect of Title VII analysis on which the Court of Appeals *did* in some sense agree with the Fourth and Eleventh Circuits, all three courts have entirely departed from this Court's cases, and from the statutory language and structure.[17] That issue is whether a case in which an employer overtly discriminates between men and women in distributing job opportunities is subject only to a bfoq defense, or whether in-

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[16] The Court of Appeals' conclusion as to the "reasonably necessary" prong of the bfoq analysis also conflicts with this Court's decision in *Criswell v. Western Air Lines, supra*. *Criswell* explains that to meet that prong of the bfoq test, an employer must show *either* that "all or substantially all" employees of the proscribed group cannot perform the job safely and efficiently *or* that it is 'impossible or highly impractical' to deal with the employees on an individualized basis. 472 U.S. at 414. As Judge Easterbrook noted, in this case it is obviously *not* true that all, or substantially, all, fertile women are likely to become pregnant, or to have excessively high blood lead levels if they do become pregnant. Pet. App. 83a. Nor has the employer explained why individual monitoring of blood lead levels will not suffice, when the OSHA lead standard requires such monitoring and the company does perform such monitoring for women who were incumbents in lead-exposed positions.

[17] In fact, there are serious doctrinal differences even on this question between *Wright* and this case, on the one hand, and *Hayes*, on the other. *Wright* and this case hold that a disparate impact analysis applies if the fetal protection was in fact the employer's reason for adopting the policy. *Wright*, 697 F.2d at 1186; Pet. App. 27a-28a. *Hayes*, instead, created a presumption that such a case is one of facial discrimination, subject only to a bfoq defense, but permitted employers to rebut that presumption by demonstrating a significant risk of fetal harm mediated only through the mother. 726 F.2d at 1548.

stead such a case can be transformed—because of the employer's *motivation* in adopting the discriminatory policy—into one in which the employer is entitled to invoke a broader legitimate business justification, ordinarily available only in disparate impact cases.

Title VII, in terms, proscribes discrimination on the basis of gender *except* when certain conditions, spelled out in the statute, are satisfied; the only such condition possibly applicable here is that the employer's policy is a bona fide occupational qualification. Nothing in the statute, and no case in this Court, permits the creation of new and additional Title VII defenses that Congress did not choose to provide, or the transformation of what is plainly explicit gender-based discrimination into a facially neutral policy on the theory that the employer's *motive* is benign, or nondiscriminatory. *City of Los Angeles Department of Water v. Manhart, supra*, holds that there is no such "benign motive" defense. *Manhart* ruled that an employer's desire to create actuarial equality between men's pensions and women's pensions—a purpose that is both benign and nondiscriminatory—could not justify facially different adverse treatment of individual women. 435 U.S. at 716-717.

Indeed, the very *function* of the statutory bfoq defense is to delineate those circumstances in which the employer's reason for adopting an overtly discriminatory policy will be regarded as valid because the female employee's "very womanhood" is inconsistent with the employer's neutral job requirements. *Dothard v. Rawlinson*, 433 U.S. 321, 336 (plaintiff's "very womanhood" is inconsistent with neutral prison employer interest in prison security). But Congress has chosen to permit such a defense only under narrow circumstances and to recognize only *certain*, narrowly-defined employer interests as sufficiently weighty to justify overt discrimination. As Judge Easterbrook observed, the courts are not entitled to alter that judgment:

> A court's belief that a good end is in view does not justify departure from the statutory framework;

it is an occasion for applying the statutory framework. . . . [*Wright* held] this *must* be a disparate impact case because the employer couldn't win it as a disparate treatment case. If the rigors of the BFOQ suggest the need for a fresh approach, that is a job for another branch. [Pet. App. 77a.]

II. Animal Studies Exclusion

In the course of its Title VII analysis, the Court of Appeals in this case held, as a matter of law, that animal studies are not the type of "solid scientific data" on which a reasonable person could reach a conclusion about the significance of toxic risks to humans. Pet. App. 34a. This sweeping holding conflicts with the longstanding view of the District of Columbia Circuit, is flatly inconsistent with the considered judgment of the medical community and of the federal agencies responsible for regulating the nation's health and safety, and disregards as well the position taken by a plurality of this Court, with no disagreement on this point by any Justice, in *Industrial Union Dept. v. American Petrol. Inst., supra.*

In *Industrial Union Dept.*, this Court invalidated an OSHA standard for benzene because the record contained insufficient evidence to support the Secretary of Labor's conclusion that benzene poses a significant risk to humans at the precise level at which the Secretary had chosen to set the standard. The plurality stated that there were a number of "rational" ways in which the Secretary could have met his burden, noting that "[i]n other proceedings, the Agency has had a good deal of data from animal experiments on which it could base a conclusion on the significance of the risk." 448 U.S. at 657 & n.64.

The District of Columbia Circuit has held as well that extrapolating the effect on humans from animal study data is eminently reasonable. For example, in *Environmental D.F. Inc. v. Environmental Pro. Agency, supra*, the EPA, acting solely on the basis of mice and rat data, suspended the registration of certain pesticides.

That court upheld the Agency's reliance on the animal data, stating that "[a]lthough extrapolation of data from mice to men may be quantitatively imprecise, it is sufficient to establish a 'substantial likelihood' that harm will result." 510 F.2d at 1299. *See also Public Citizen Health Research Group v. Tyson, supra*; *Environmental Defense Fund, Inc. v. E.P.A., supra.*

The implications for the nation's health and safety regulatory system of the Court of Appeals' categorical disqualification of animal studies cannot be overstated. Under at *least* nine federal statutes, animal studies are not only relied upon, but frequently provide the sole basis for regulation.[18] Under the Seventh Circuit's ruling, otherwise supportable regulations may now be invalidated whenever the agency relies upon animal data, regardless of the particular studies' methodological soundness; that approach would wreak havoc on the federal regulatory system.

III. Importance Of The Case

Judge Easterbrook's assessment of the importance of this case—that it is "likely the most important sex discrimination case in any court" since Title VII was enacted—is not hyperbole. First, the reach of the workplace situations that may entail some particularized risk to fetal health is quite broad:

> [P]otential [fetal hazards] in the modern workplace rang[e] from toxic chemicals in the office, to biological hazards in the hospital and laboratory, to pesticides on farms, to heavy metals such as lead, cadmium, and mercury in industry, according to a

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[18] *See* Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136-136Y; Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 301, 348(c)(3)(A); Consumer Product Safety Act, 15 U.S.C. § 2051; Safe Drinking Water Act, 42 U.S.C. §§ 300(f) *et seq.*; Toxic Substances Control Act, 15 U.S.C. §§ 2601-2629; Federal Water Pollution Control Act, 33 U.S.C. § 1317(a); Clean Air Act, 42 U.S.C. § 7401 et seq.; Occupational Safety and Health Act, 29 U.S.C. § 651; Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6901 *et seq.*

> number of experts. In addition . . . some health professionals have suggested that radiation emitted by video display terminals, stress, and noise may be possible factors in reproductive problems. [Bureau of National Affairs, *Pregnancy and Employment* ("BNA") (1987)].[19]

While the precise number of workers exposed to such potential hazards can only be estimated, the 20 million figure relied on by Judge Easterbrook has been accepted by the EEOC, *see* 45 Fed. Reg. 7514 (1980), and, given the range of industries affected, does not seem at all out of line.[20]

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[19] *See generally* U.S. Congress, Office of Technology Assessment ("OTA"), *Reproductive Health Hazards in the Workplace*, pp. 69-126 (1985). Some of the industries in which there is substantial evidence of fetal risk include those in which women have traditionally been most heavily employed, including hospitals and childcare centers. *See BNA, supra*, at 68, 86-87; 19 Occupational Safety and Health Reporter 1223 (December 6, 1989) (between 25% and 60% of preschool children cared for in daycare centers have a virus that is harmless to them, but which, if it infects female childcare workers during the first 24 weeks of pregnancy, places the fetus at an increased risk of about 15% of permanent neurological damage). In addition, new technologies have been implicated as fetal hazards. *See* BNA, *supra*, at 82-83.

[20] For example, in the late 1970's over 1.3 million jobs in this country involved exposure to lead alone. Hricko, *Social Policy Considerations of Occupational Health Standards: the Example of Lead and Reproductive Effects*, 7 Preventive Medicine 394, 395 (1978). The Office of Technology Assessment estimates that there are a total of three million workers exposed to only two of the chemicals implicated as reproductive hazards. OTA, at 87, 90. And there are approximately 589,000 childcare workers, 97% of whom are women. U.S. Department of Labor, *Occupational Outlook Handbook* (1989) at 277; Child Care Employee Center, *National Child Care Staffing Study* (1989).

It may be that because of the need to retain an adequate workforce in the most female-intensive workplaces, employers will choose to make the workplace safe for women *and* their potential offspring, rather than to exclude fertile women because of fetal risks. But that observation simply indicates that the willingness of employers in male-dominate industries to exclude broad classes of women for fetal protection purposes reflects a subtle assumption

Second, as the scientific evidence concerning such risks develops, it appears that the number of women who have in fact been excluded from the workplace based on fetal protection concerns is tending to increase. In 1979 that number was estimated to be at least 100,000. Williams, *Firing the Woman to Protect the Fetus: The Reconciliation of Fetal Protection with Employment Opportunity Goals Under Title VII*, 69 Geo. L. J. 641, 647 n. 30 (1981). Concern with and research on reproductive health hazards has subsequently burgeoned; indeed, the policy in this very case was instituted after 1979. More recent studies indicate, without quantifying the number of women affected, an increasing incidence of exclusionary policies in many major companies, such as General Motors, B.F. Goodrich, Allied Chemical, Chemical, Monsanto, Gulf Oil, and Sun Oil. Becker, *From Muller v. Oregon to Fetal Vulnerability Policies*, 53 U. Chi. L. Rev. at 1226.

Third, the mode of analysis employed by the Court of Appeals is likely to encourage employers to impose broad new fetal protection policies. That analysis, for one thing, would permit the exclusion not only of pregnant women, but of all fertile women, on the generally applicable theory that women may not know they are pregnant in the early weeks, and thereby may expose fetuses to hazards unknowingly. Pet. App. 53a. Further, by placing the burden of persuasion on the plaintiffs to *disprove* the significance of the risk and its mediation through women alone, that court has substantially lightened the burden upon employers seeking to justify exclusion of women on fetal protective grounds. As Judge Posner noted, this lightening of the employers' burden "may encourag[e] incautious employers to adopt fetal protection policies that could endanger the jobs of millions of women." Pet. App. 73a.

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that women are nonessential workers, who are better excluded than accommodated.

Further, the opinion below allows employers to act based on the risks to fetuses created by the workplace alone, without taking into account the risks posed to fetuses if the mother does not have sufficient economic resources before and after pregnancy. Because the effect is to permit employers to make a basic decision of social policy, without having to give weight to all the societal factors pertinent to that decision, the net result may be a *decrease*, not an increase, in overall health of children.

Finally, the court of appeals opinion has broad implications for Title VII doctrine beyond the fetal protection area. As noted, that opinion vastly expands the concept of the bfoq defense to include broad societal concerns with little direct impact on the business itself. Moreover, the opinion below encourages other employers to come forward with "neutral" rationales for facial discrimination, thereby transforming a disparate treatment case into a disparate impact case far harder for the discrimination claimant to prosecute and prove. The effect would be fundamentally to restructure Title VII litigation as we have known it, and to weaken its protections against discrimination.

CONCLUSION

For the above-stated reasons, this petition for a writ of *certiorari* should be granted.

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